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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

JOHN F. BYRNES, ET AL.,

Respondents.

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

IRMA M. ALICEA, ET AL.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition makes clear, the court of appeals created or exacerbated multiple splits of authority among the federal circuits with respect to the questions presented in the petition. The decisions below:

- adhere to the view that "ambiguous plan language" can suffice to create vested ERISA welfare benefits, a standard that is directly contrary to the "clear and express language" test employed by five other circuits;
- hold that retiree welfare benefits can vest even before retirement, in conflict with three other circuits;
- permit claimants to maintain breach of fiduciary duty claims under § 502(a)(3) of ERISA where a claim for benefits under § 502(a)(1)(B) is also available, contrary to the law of six other circuits;
- allow an employer's amendment of an ERISA welfare plan to constitute a fiduciary act, contrary to the decisions of this Court and of three other circuits; and
- deem the failure to disclose in plan communications the non-vested nature of welfare plan benefits a breach of fiduciary duty, whereas five circuits reject any duty to disclose such information.

In response, the *Byrnes* respondents rely on inapplicable arguments concerning legal propositions that are simply not in dispute, mischaracterize the decisions below, and posit specious distinctions with respect to the circuit conflicts presented here. The *Alicea* respondents[1] fare no better, implau-

[1] Respondents who were plaintiffs in the second case below, *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), *reproduced at* Pet. App. 25a-46a, have referred to themselves as the *Abbruscato* respondents in this Court. As noted in the petition, however (Pet. 1 n.2), Calogera Abbruscato did not perfect an appeal to the Second Circuit, and accordingly is not a respondent in this Court. *See* Pet. App.

sibly attempting to dismiss the legal rules applied by the court below—which require trial as to claims that would not survive summary judgment in most other circuits—as merely a matter of docket management.

Respondents' contentions cannot obscure the fact that the decisions below adopt rules of federal law that are inconsistent with the rules applied by other federal circuits, concerning matters of great national importance that affect the ERISA welfare plans of many millions of American workers and retirees. This Court's review is essential to bring clarity to these issues, which are marked by an ever-increasing divergence of authority among the circuits in an area of the law that demands national uniformity.

I. The Circuit Conflicts Over The Proper Standards For Determining Whether And When ERISA Welfare Plan Benefits Have Vested Are Squarely Presented Here And Merit Plenary Review

1. Respondents effectively concede that the circuits are sharply divided over the proper legal test for determining whether ERISA welfare plan benefits have vested. *See, e.g.*, Pet. 11-16 (discussing the circuit conflict); *Byrnes* Opp. 3-4 ("Empire's observation [regarding the conflicting standards] may be true"). Respondents' concession in this regard is well advised; the Second Circuit itself acknowledged the "circuit split as to the summary judgment rules for contractual vesting," Pet. App. 12a, but nonetheless adhered to its view that mere ambiguity can create a triable issue of fact on the question of vesting. *Id.* at 10a-12a, 36a. As amply demonstrated in the petition (Pet. 12-15), that holding is consistent with the law in three other circuits, but squarely at odds

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25a (case caption); SUP. CT. R. 12.6 (only "parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties" in this Court). For the sake of accuracy, therefore, this reply brief will refer to those respondents as the *Alicea* respondents. *See* Pet. 1 n.2.

with the test adopted by the Third, Fourth, Fifth, Sixth, and Tenth Circuits, which provides that welfare plan benefits do not vest unless an intent to vest is set forth in "clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993).

Rather than confront the implications of this stark circuit conflict, the *Byrnes* respondents first argue that "employers are free to provide vested benefits" under ERISA welfare plans. *Byrnes* Opp. 2-3. That proposition is simply beside the point, however, because the question presented in the petition is not whether welfare plan benefits *can* vest, but rather what legal standard courts must use in determining whether such benefits *have* vested. It is that latter question that continues to divide the circuits and merits this Court's review.

The *Alicea* respondents take a different tack, acknowledging the circuit conflict but suggesting that the Second Circuit's test is preferable to the "clear and express language" rule. *Alicea* Opp. 2-4; *see also Byrnes* Opp. 5-6. Respondents' halfhearted attempts to defend the Second Circuit's "ambiguous plan language" test are unpersuasive. The Second Circuit's test has no statutory basis, creates substantial uncertainty and need for litigation, threatens to impose massive liability on unsuspecting employers and ERISA plans, and undermines Congress's express refusal to require vesting in the welfare plan context. *See* Pet. 16-19. And in any event, respondents' arguments regarding the purported merits of the "ambiguous plan language" rule are irrelevant at this stage of the proceedings, because those arguments do nothing to lessen the importance of the question presented or the need for this Court to resolve the circuit conflict.[2]

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[2] The *Alicea* respondents also assert that "the venue and jurisdictional requirements of the Federal Courts" will prevent widespread forum shopping attributable to the divergent vesting rules employed in different regional circuits. *Alicea* Opp. 5. To the contrary, however, under ERISA's venue provision (29 U.S.C. § 1132(e)(2)), corporate defendants can be

The *Alicea* respondents also contend that the conflict among the circuits is simply "a matter of how the different circuits want to manage their trial dockets." *Alicea* Opp. 4. That contention is absurd. Rules of law that determine the elements of the prima facie case a plaintiff must establish in order to avoid summary judgment are quintessentially substantive in nature, and are precisely the types of rules that this Court reviews many times each Term.[3]

Ultimately, both sets of respondents retreat to the assertion that, regardless of which of the conflicting legal rules is the correct one, "Empire's promise was clear and express" and thus "the promise is enforceable even under the standard that Empire seeks to invoke." *Byrnes* Opp. 4; *see id.* at 1-2; *Alicea* Opp. 5-6. That bald assertion, however, is belied by the Second Circuit's decisions below, which expressly conclude that the relevant documents are ambiguous.[4]

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sued in any district in which they are subject to personal jurisdiction. *See, e.g., Brightway Adolescent Hosp. v. Hawaii Mgmt. Alliance Ass'n*, 139 F. Supp. 2d 1220, 1225 (D. Utah 2001) (collecting cases); *see also* 28 U.S.C. § 1391(c). Thus, plaintiffs will have little difficulty selecting a favorable forum in which to assert claims for allegedly vested ERISA welfare plan benefits. And even leaving aside the clear danger of forum shopping, it is intolerable for the standards governing vesting of ERISA welfare benefits to vary widely from region to region, especially in view of "ERISA's concern for securing *national uniformity* in the administration of employee benefit plans." *Boggs v. Boggs*, 520 U.S. 833, 842 (1997) (emphasis added).

[3] Oddly, the *Alicea* respondents suggest that "the decision of the Second Circuit with respect to the early retirees" is not "the subject of Empire's petition." *Alicea* Opp. 1. To the contrary, the Second Circuit's ruling with respect to the *Alicea* early retirees rests on its erroneous adoption of the "ambiguous plan language" rule, and is directly at issue here. *See* Pet. App. 35a-36a; *see also* Pet. 11-12 (quoting *Alicea* decision).

[4] *See* Pet. App. 15a ("Because of the ambiguity of the language, the ultimate determination of whether Empire promised lifetime benefits should be left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language." (from *Byrnes* opinion)),

Respondents cannot possibly satisfy the "clear and express language" test established by *Wise v. El Paso Natural Gas Co.* and its progeny. None of the isolated statements they seize upon constitutes the requisite "precise language denying the right to withdraw benefits." *Wise*, 986 F.2d at 938. Indeed, in direct refutation of respondents' attempts to distinguish *Wise*, the Second Circuit explicitly recognized that "*Wise* . . . presents facts similar to those presented here." Pet. App. 10a. "Notwithstanding these similarities," however, the Second Circuit permitted respondents to proceed to trial—not because of any purported factual distinctions between these cases and *Wise*, but because the Second Circuit "take[s] a different view" of the proper legal test. *Id.* at 11a.[5]

Thus, this case squarely presents the issue that has divided the circuits, as the Second Circuit itself correctly acknowledged. Plenary review is warranted.

2. In addition to the foregoing circuit conflict, the decisions below also conflict with precedents from other circuits holding that retiree welfare benefits do not vest prior to retirement. Pet. 15-16. The *Byrnes* respondents offer no response at all on this point, and the *Alicea* respondents con-

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24a (remanding "to illuminate the ambiguities present in the pre-1987 SPDs" (from *Byrnes* opinion)), 36a ("because we conclude that the VSOP and VIP documents are ambiguous, we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions" (from *Alicea* opinion)).

[5] The *Alicea* respondents attempt to distinguish *Wise* on the ground that the employer in *Wise* announced the reduction in benefits in advance and gave employees an opportunity to take early retirement. *Alicea* Opp. 4. But that proffered distinction is irrelevant. Under the Second Circuit's test, the employer in *Wise* would have been *precluded* from obtaining summary judgment because its failure to include an express reservation-of-rights clause in its earlier SPDs would have given rise to a jury question regarding whether its promised health insurance benefits had vested. And once benefits have vested, an employer cannot terminate them—regardless of how much "advance notice" it provides.

tend only that two of the decisions relied on by petitioner—*Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 919 (6th Cir. 2000), and *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994)—are distinguishable because neither case involved alleged promises of lifetime benefits. *Alicea* Opp. 6. That distinction lacks any legal significance, however, because those courts, as well as the Fifth Circuit in *Wise*, adopted a legal rule that flatly contradicts the rule applied by the court below. These other circuits have held that retiree welfare benefits do not vest before retirement (Pet. 15-16), whereas the court below held that such benefits *do* vest before retirement. Pet. App. 12a-15a. Whether the facts allegedly giving rise to pre-retirement vesting involve lifetime benefits is immaterial to the legal question of whether retiree welfare benefits *do* vest before retirement. Thus, respondents fail to offer any plausible explanation for why this Court should not resolve the clear circuit split on this issue.

II. The Circuit Conflicts Created By The Second Circuit's Rulings On The Fiduciary Duty Issues Are Squarely Presented And Merit Plenary Review

1. As demonstrated in the petition (Pet. 20-24), the decisions below conflict with cases from no fewer than six other circuits that expressly preclude ERISA plaintiffs from pursuing both a breach of fiduciary duty claim under § 502(a)(3) and a denial of benefits claim under § 502(a)(1)(B). In response to this showing, respondents simply ignore the bulk of the conflicting circuit decisions cited in the petition (Pet. 23), presumably because there is no colorable basis for distinguishing those cases from the contrary decisions below. Respondents do attempt to distinguish two of the cases cited in the petition—*Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998), and *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999)—but their efforts in that regard are wholly unpersuasive.

According to the *Byrnes* respondents, *Tolson* and *Katz* are inapposite because in those cases the claims asserted under § 502(a)(3) were essentially the same as the benefits claims under § 502(a)(1), whereas the fiduciary duty claims at issue in *Byrnes* are purportedly "separate and distinct" from the *Byrnes* respondents' claims for benefits under § 502(a)(1)(B). *Byrnes* Opp. 7-9. In reality, however, *Tolson* and the other cases cited in the petition are on all fours with this case. In *Tolson*, for example, the plaintiff alleged wrongful denial of benefits under § 502(a)(1)(B) as well as a § 502(a)(3) claim based on alleged misrepresentations regarding the availability of those same benefits. 141 F.3d at 607, 610; *see also Katz*, 197 F.3d at 1087-89. That is *precisely* the scenario presented here: Respondents' breach of fiduciary claims under § 502(a)(3) involve alleged misrepresentations concerning whether they were entitled to the benefits that they seek in their separate claims under § 502(a)(1)(B), and arise out of the same alleged injury. Thus, respondents' attempt to distinguish *Tolson* and *Katz* is entirely without merit.[6]

Respondents' arguments regarding *Varity Corp. v. Howe*, 516 U.S. 489 (1996), are equally unpersuasive. Far from authorizing simultaneous claims under both § 502(a)(1) and § 502(a)(3), as respondents would have it (*Byrnes* Opp. 7-8), *Varity* in fact makes clear that § 502(a)(3) relief can be pursued only in the absence of other grounds for relief under

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[6] The *Byrnes* respondents' argument that their fiduciary duty claims are "separate and distinct" from their benefits claims is further refuted by their own brief in opposition, which reveals that their fiduciary duty claims are in fact inextricably intertwined with their benefits claims. *See Byrnes* Opp. 10 (arguing that Empire's alleged status as a fiduciary rests on the assertion that "Empire divested Respondents of a vested benefit"—the very assertion that lies at the heart of the benefits claims). Likewise, the Second Circuit necessarily viewed these claims as intertwined, since it predicated Empire's fiduciary status on the purported viability of the benefits claim. Pet. App. 20a.

§ 502. *See* 516 U.S. at 512, 515. This Court in *Varity* allowed the plaintiffs to proceed with a breach of fiduciary duty claim *only* because they had no ability to proceed under § 502(a)(1)(B); "they were no longer members of the ... plan and, therefore, had no 'benefits due [them] under the terms of [the] plan.'" 516 U.S. at 515; *see also* Pet. 20-21. Respondents suffer from no such disqualification here. Thus, under *Varity* and the law of six other circuits, respondents would not be entitled to bring a breach of fiduciary duty claim. The contrary conclusion reached by the court below is irreconcilable with these decisions, and nothing in respondents' oppositions demonstrates otherwise.[7]

2. As previously demonstrated (Pet. 24-28), the Second Circuit's holding that a mere plan amendment can constitute a fiduciary act creates yet another square conflict among the authorities. Respondents do not even cite, much less distinguish, this Court's controlling precedents, which categorically foreclose the rule of law announced below. *See* Pet. 25 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). The *Byrnes* respondents do contend that there is a distinction between revocation of non-vested benefits and revocation of allegedly vested benefits, but they fail to explain why an employer's status as a fiduciary should vary depending on the nature of the benefits at issue, and nothing in this Court's cases or in the conflicting decisions from other circuits supports this proffered distinction.

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[7] Although the *Alicea* respondents discuss in some detail the facts of two cases cited by petitioner—*LaRocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), and *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998)—they make no attempt to explain how the facts of those cases relate to respondents' argument. *Alicea* Opp. 8. As the petition explains (Pet. 22), these cases clearly show that the First and Fifth Circuits have adopted a legal rule that is flatly inconsistent with the position of the court below.

Moreover, the Sixth and Seventh Circuits have squarely held that *even where vested rights are at issue*, an employer's modification of a welfare plan is not a fiduciary act. *See Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1377-78 (6th Cir. 1994) (holding employer's reduction of vested benefits invalid, but not a fiduciary act); *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1002 (7th Cir. 1993) (holding employers' selection of method for determining withdrawal liability not a fiduciary act, even though it affected vested benefits). The *Byrnes* respondents' attempt to distinguish *Wulf* on the ground that the employer there was not the plan administrator (*Byrnes* Opp. 10) is a non sequitur. Plan amendment is a settlor function, not a plan administrator function, and thus an employer's status as plan administrator is irrelevant in this context. *Spink*, 517 U.S. at 890; *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990); *see generally* Pet. 27. Indeed, not even the Second Circuit below relied on the *Byrnes* respondents' proffered rationale; instead, it reasoned that an employer's cancellation of "vested" benefits can constitute the "exercise[] [of] discretionary authority with respect to the plan" and thus be a fiduciary act. Pet. App. 20a. That reasoning is irreconcilable with *Wulf*.

3. Finally, the *Byrnes* respondents attempt to muddy the waters concerning the circuit split on the question whether a claim for breach of fiduciary duty can lie for failure to disclose in plan communications that ERISA welfare benefits are not vested. *Byrnes* Opp. 11-13. In the first place, the *Byrnes* respondents misstate the holding below. The Second Circuit did not authorize a fiduciary breach claim based on a "promise to provide a vested benefit" coupled with a failure to disclose that the benefit is revocable, as the *Byrnes* respondents would have it. *Id.* at 11. Rather, the Second Circuit held that "if, on remand, the trier of fact determines that there was *no* promise to vest the life insurance benefits," Empire's failure to disclose the non-vested nature of the

benefits could give rise to liability for fiduciary breach. Pet. App. 21a (emphasis added). Thus, the *Byrnes* respondents' arguments, which rest on the allegedly misleading nature of a promise to "vest" benefits that are not in fact vested, are simply beside the point, because the theory of fiduciary liability approved by the Second Circuit proceeds on the assumption that there was *no* promise to "vest" benefits.

In any event, five other circuits have squarely rejected the Second Circuit's view that a failure to disclose the nonvested nature of welfare plan benefits can constitute a fiduciary breach. *See* Pet. 28-30 (citing cases). Without addressing the bulk of these conflicting authorities at all, the *Byrnes* respondents attempt to distinguish *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), as not involving alleged lifetime benefits, and *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc), as involving prior reservations of the right to amend. *Byrnes* Opp. 11-12. Those proffered distinctions are unpersuasive. Indeed, petitioners seriously misread *Jensen*, which *did* involve promises of "lifetime" benefits (*Jensen v. SIPCO, Inc.*, 867 F. Supp. 1384, 1389-90 (N.D. Iowa 1993); 38 F.3d at 950-51), but nonetheless held that "a welfare plan SPD is not required to disclose that plan benefits are not vested." 38 F.3d at 952. Moreover, Empire explicitly set forth its reserved right to amend its plans in the 1987 SPD (as well as in the VSOP and VIP documents), and thus *Sprague* is directly on point as well. Pet. App. 36a-37a.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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